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Re: Guantánamo

A human rights appeal to the US administration and Congress

To: President Obama, members of the US administration, and members of Congress

In recent weeks, the detentions at the US naval base in Guantánamo Bay have been back in the spotlight, forced there by the hunger strike in which more than half of the detainees are currently involved. This new attention has resulted in an administration promise of a "renewed effort" to close this notorious prison camp. In this appeal, Amnesty International calls on members of the administration and Congress to seize this moment as an urgent priority, to address the detentions as a matter of human rights, and to close the detention facility in accordance with those principles.[1]

Whatever the facts about what sparked this hunger strike, the unavoidable backdrop to it is the abject failure of the USA to resolve the detentions within any reasonable timeframe and in line with the requirements of human rights law and standards. Those organizations and individuals seeking to ensure respect by governments for international human rights principles feel compelled yet again to speak out against this ongoing failure. In recent weeks, appeals have come from the United Nations High Commissioner for Human Rights, the UN Working Group on Arbitrary Detention, three UN Special Rapporteurs (whose mandates cover torture and other ill-treatment, health and counter-terrorism and human rights), and the Inter-American Commission on Human Rights. It is clear that the USA's detention regime at Guantánamo is an international *human rights* concern. It is long overdue for the USA itself to address the detentions as a human rights issue and to act accordingly.

As Amnesty International noted in a report of 3 May 2013, issued after the number of Guantánamo detainees recognized by the military authorities as being on hunger strike reached 100, a glimmer of hope that progress could yet be made towards resolving the detentions came on 30 April with President Obama's restatement of his belief that the detention facility should be closed.[2] While we of course welcome the President breaking his recent silence on this issue to restate his commitment to closure of the prison camp, we regret that once again his comments included no reference to human rights. Indeed, we are yet to see any public recognition by the US authorities that the solution to the Guantánamo "problem" lies in and must comply with international human rights law and principles.

Instead, the issue continues to be framed by US officials in terms of domestic interests and values and the USA's flawed, unilaterally declared and ill-defined global "war" against al-Qa'ida and associated groups. In this regard, we note with regret recent comments by Michael A. Sheehan, Assistant Secretary of Defense for special operations and low-intensity conflict, and Robert S. Taylor, Acting General Counsel for the Department of Defense, supporting the continued validity of the Authorization for Use of Military Force (AUMF), a broad and much abused resolution passed by Congress on 14 September 2001. Testifying before the Senate Armed Services Committee on 16 May 2013, these Pentagon officials agreed that when hostilities with al-Qaida end, the AUMF will no longer be in force. Sheehan suggested that the end of the conflict is "at least years in advance…It's many years in advance." Today the AUMF is used among other things to justify the USA's regime of indefinite administrative detention at Guantánamo which is in violation of international human rights law.

[1] This appeal follows a letter to US Secretary of Defense Charles Hagel transmitted by fax and mail on 22 March 2013, to which we await a response. The letter is available at http://www.amnesty.org/en/library/info/AMR51/014/2013/en

[2] The report, *USA: 'I have no reason to believe that I will ever leave this prison alive'*, issued on 3 May 2013, is available at http://www.amnesty.org/en/library/info/AMR51/022/2013/en

As a result of such thinking, while the administration continues to blame Congress for blocking resolution of the detentions – and Congress certainly has a case to answer for its human rights failure in this regard – even the administration's own promise to close Guantánamo would apparently still involve moving some four dozen detainees into indefinite detention elsewhere and the use for at least some prosecutions of a military commission system that does not meet international fair trial standards.

This was illustrated in a speech to the Oxford Union on 7 May 2013 by former Department of State Legal Advisor Harold Hongju Koh. President Obama, said Harold Koh, "does not need a new policy to close Guantánamo. He just needs to put the full weight of his office behind the sensible policy that he first announced in January 2009". Amnesty International disagrees. Yes, the President should put the full weight of his office behind this effort, and yes, the administration can take immediate steps to begin transferring those under its existing policy that have long been "approved for transfer". But the underlying policy must be amended to make it fully consistent with the USA's human rights obligations and to ensure human rights compliant solutions for all the detainees, not just some category of them. For, as Harold Koh noted, the administration's existing policy includes not only support for the use of military commissions for some detainees but also the indefinite detention of those classified under the USA's flawed global war theory as "Law of War Detainees" (albeit with, as the former Legal Adviser put it, "long-overdue legally mandated [executive] periodic review").

At a press conference on 13 May, Attorney General Eric Holder restated the administration's commitment to closing the detention facility. He said that President Obama "has indicated that it's too expensive, it's a recruitment tool for terrorists, it has a negative impact on our relationship with our allies – so we're going to make a renewed effort to close Guantánamo". Again, while the promise of a "renewed effort" is cause for some cautious optimism, the Attorney General made no reference to human rights. He did say that the administration was "looking at candidates" to take the matter forward following the announcement earlier this year that the Office for the Special Envoy for the Closure of Guantánamo Bay was itself being closed down. Amnesty International welcomes that the administration is looking to make such an appointment and urges that the person selected be someone who fully recognizes the USA's international human rights obligations and the need to fully meet these obligations in resolving these detentions.

The fact that human rights is missing from public pronouncements on Guantánamo is the result of policy choices. In other contexts, the USA has had no difficulty speaking the language of human rights. Just last month, for example, the US Department of State issued its latest human rights assessment of other countries, condemning time and again the sort of violations for which the USA itself is responsible at Guantánamo. All governments have a responsibility to protect universal human rights", said Secretary of State John Kerry when launching this report; "So anywhere that human rights are under threat, the United States will proudly stand up". The US government has yet to stand up for human rights when it comes to Guantánamo.

Amnesty International recalls how in 2009, then Secretary of State Hillary Clinton said that "a commitment to human rights starts with universal standards and with holding everyone accountable to those standards, including ourselves." Citing this stance, then State Department Legal Adviser Harold Koh said in 2010 that a prong of the "Obama-Clinton doctrine" was that the USA would follow "universal standards, not double standards". If any other country were responsible for a detention regime as operated in Guantánamo, the USA would surely be among its leading critics and would be rejecting as illegitimate any attempt by the government of that country to cite domestic political and legislative obstacles as an excuse for its continuation. As Article 27 of the Vienna Convention on the Law of Treaties makes clear, a country may not invoke provisions of its internal law as justification for its failure to meet its treaty obligations.

Meanwhile, the number of detainees officially recognized by the Guantánamo authorities as being on hunger strike has continued to rise: from 14 in mid-March to 45 in mid-April, the figure reached 100 on 27 April, rising to 102 on 16 May. It is important for officials to see past the statistics, and consider the individualized human impact of its Guantánamo detention policy. In so doing, there can be no divorcing of the current situation from what has gone before. The psychological and physical impact of years of indefinite detention will be added to the effects of other human rights violations, including enforced disappearance and torture or other cruel, inhuman or degrading treatment, the detainees endured during the interrogation process at the hands of military or other government agency personnel after being taken into US custody. The absence of remedy and accountability for these violations also leaves the USA in breach of its international human rights obligations.

One of the detainees on hunger strike is Obaidullah, an Afghan national who has been in US military custody without trial since being arrested during a night raid of his family home in Afghanistan on 21 July 2002. In nearly 11 years, he has never been brought to criminal trial to have any charges against him tested in an independent court.

In Obaidullah's case, he was initially held for about two days at a US forward operating base in Khost, then for three months at the US air base at Bagram. Obaidullah has alleged that he was subjected to torture or other ill-treatment at both these US facilities, as well as at the Guantánamo prison camp, where he has been held since October 2002. For over a decade, he has been incarcerated some 8,000 miles (13,000 kilometres) from his home and family. His daughter, born two days before he was arrested, is now over 10 years old. Obaidullah himself was aged about 19 when he was taken into US custody. He is now about 30. He told his lawyer in late March 2013: "I

am losing all hope because I have been imprisoned for almost eleven years now at Guantánamo and still do not know my fate".

Another of the men who has been on hunger strike is Yemeni national Musa'ab Al Madhwani. It is now three years since a federal judge found his detailed allegations of secret detention, torture and other ill-treatment in US custody to be "credible", yet there has been no accountability or remedy for these human rights violations as far as Amnesty International is aware. Meanwhile, Musa'ab al Madwhani remains in indefinite detention without charge. In a sworn statement in March, he said:

> "I have been in prison in Guantánamo Bay, Cuba, for ten and a half years... Before I was sent to the prison at Guantánamo Bay, I was detained at the Dark Prison at Bagram Air Base where I was tortured and deprived of food and water. Both of my parents have died during the time that I have been in prison in Guantánamo Bay. They were waiting for me to come home and now they are gone. I am afraid that my entire family will be dead before I am released from this prison. I, and other men here at the prison, feel utterly hopeless. We are being detained indefinitely, without any criminal charges against us... I have no reason to believe that I will ever leave this prison alive. It feels like death would be a better fate than living in these conditions. I am dying of grief and pain on a daily basis because of this indefinite detention..."

Just last month, even as the US administration was continuing to publicly blame Congress for blocking movement on the Guantánamo detentions, it was arguing (successfully) in District Court for Mus'ab Al Madhwani's motion for emergency relief to be denied on grounds that Congress had stripped jurisdiction from the courts to hear any such claims. Again, it is hardly surprising that Guantánamo remains a byword for injustice and double standards.

It is now almost seven years since the UN Committee against Torture in its concluding observations following review of US compliance with the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment told the US government that holding people indefinitely without charge was "per se a violation of the Convention". On 1 May 2013, the UN Special Rapporteur on torture, Juan Mendez, said:

> "At Guantánamo, the indefinite detention of individuals, most of whom have not been charged, goes far beyond a minimally reasonable period of time and causes a state of suffering, stress, fear and anxiety, which in itself constitutes a form of cruel, inhuman, and degrading treatment."

Despite the clear human impact of this detention regime and its cruelty to detainees and their families, the US government continues to operate the facility as if it exists in a human rights free zone contrary to international law. Detainees long denied their human rights have turned to a form of protest they have a right to engage in.

In a sworn statement signed on 27 March 2013, Obaidullah stated that he had never previously participated in a hunger strike, and that his decision to do so on this occasion was sparked by "the latest actions in the camps [that] have dehumanized me". Here he was referring to what he described as "invasive" cell searches conducted in the week of 6 February 2013, during which he said his blanket, sheet, towel, family photos and other documents, mail from his attorneys and other items. He also alleged mishandling and disrespect of Qu'rans by US soldiers during the search, and a deterioration of detention conditions against hunger strikers. Amnesty International is aware that Guantánamo officials have dismissed allegations of abusive cell searches, but the organization nevertheless urges the administration to fully review current detention policies and conditions with a view to ensuring that all are in compliance with international law and standards and medical ethics.

As of 16 May 2013, 30 detainees were reportedly being "tube fed", including Fayiz al-Kandari, a Kuwaiti national who has been held at Guantánamo without trial since May 2002, after being transferred there from Afghanistan. Another of the detainees reportedly being "tube fed" is Uthman Abdul Rahim Mohammed Uthman, a Yemeni national taken into custody by Pakistani authorities in October 2001, before being handed over to the USA and taken to Guantánamo on 16 January 2002. He has been held ever since without charge or trial. His detention was found unlawful by a federal judge in 2010 before the government appealed and the Court of Appeals overturned the decision.

In a letter to Secretary Hagel, dated 25 April 2013, the American Medical Association (AMA) raised the issue of medical ethics in relation to the feeding of detainees at Guantánamo. The AMA cited the Declaration of Tokyo, which provides Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment, and states at paragraph 6 that:

> "Where a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially. The decision as to the capacity of the prisoner to form such a judgment should be confirmed by at least one other independent physician. The consequences of the refusal of nourishment shall be explained by the physician to the prisoner."

The World Medical Association's later and more specific Declaration of Malta on Hunger Strikers reviews the ethics issues arising from a hunger strike. After consideration of the possible circumstances and complications arising during a hunger strike and noting the right of the competent hunger striker to communicate his or her wishes to the doctor, the Declaration concludes:

> "Forcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment. Equally unacceptable is the forced feeding of some detainees in order to intimidate or coerce other hunger strikers to stop fasting."

Amnesty International urges the US authorities to stop the force feeding of any mentally competent detainees. Force feeding of a mentally competent hunger striker is not only contrary to medical ethics but in addition breaches their right to freedom of expression. Accordingly, force feeding must never be used as a tool of repression or means to break the strike and impede a detainee's right to peaceful protest. Additionally, force feeding would amount to cruel, inhuman or degrading treatment, or even in some circumstances torture, in violation of international law if it is intentionally and knowingly conducted in a manner that causes unnecessary pain or suffering. As we noted in our report of 3 May, there is cause for concern in this regard in view of accounts of detainees and the past history of force feeding at Guantánamo.

Decision-making in the area of hunger strikes is undoubtedly complex, which heightens the need for the detainees to be guaranteed continued and regular access to independent medical assessment and care. This is clearly missing at Guantánamo.

Amnesty International's concerns have only been amplified by the Guantánamo revised "Standard Operating Procedure: Medical Management of Detainees on Hunger Strike", dated 5 March 2013 (the policy document) which was made public in May. The policy document makes references to medical care, but at the same time clearly shows that decision-making is in the hands of the military command. What is also clear is that the "management" of hunger strikes is seen as managing a problem for the military rather than guaranteeing the human rights of detainees held in violation of international law.

Thus on the one hand the document states that "DoD [Department of Defence] and Joint Task Force Guantanamo (JTF GTMO) policy is to protect, preserve, and promote life. This includes preventing any serious adverse health effects and death from hunger strikes." What the document ignores is the context: those whose lives are of such concern to the US military authorities have been held year after year contrary to international law, with no possibility of family visits, with limited access to legal assistance, and with no apparent possibility of fair trial.

The Guantánamo policy document acknowledges that voluntary consent is a desirable precursor to any medical procedures and states that "medical personnel will make reasonable efforts to obtain voluntary consent for medical treatment." However, it also states that "[w]hen consent cannot be obtained, medical procedures that are indicated to preserve health and life shall be implemented without consent from the detainee." Thus the emphasis on protecting health and life of the detainees is made at the same time as their human rights, including the right to protest and refuse food, are stripped from them.

The document states that "a JMG [Joint Medical Group] medical provider will counsel the detainee who is on a hunger strike as to the medical hazards of a prolonged period without food and/or water." The point is underlined – "medical staff shall explain the medical risks faced by the detainee" and then undermined – medical personnel will "make a reasonable effort to convince the detainee to resume eating food and drinking water." Two pages later, the guidelines reiterate that "Prior to medical treatment being administered, medical staff will make reasonable efforts to convince the detainee to voluntarily resume eating or accept treatment. The MG [Medical Group] staff will explain medical risks the detainee faces if he does not accept treatment." Thus, medical personnel at Guantánamo move from a carer role to a role as prison staff member seeking to persuade the hunger striker to end his protest. And if the medical personnel fail to persuade the hunger striker to stop their food refusal, the detainee's decision will be overridden and force feeding may commence. It will be the "JTF-GTMO Commander [who] will decide whether to order the involuntary feeding of a detainee ..." – a military officer, not an independent medical professional.

The "Clinical Protocol for the Evaluation, Resuscitation, and Feeding of Detainees on Hunger Strike" at page 14 of the Guantánamo policy document states that "in event of a mass hunger strike, isolating hunger striking patients from each other is vital to prevent them from achieving solidarity" which appears to suggest that such measures are employed as a means to break the protest. The emergence of this policy also raises questions about the basis for the order issued by the commander of JTF-GTMO on 13 April 2013 to transfer detainees from communal to single-cell living at Camp VI "to ensure the health and security of those detainees".

Any official response to the hunger strike must be free of punitive intent. In particular, detainees should not be punished for exercising their right to peaceful protest. Furthermore, conditions of detention should conform to the UN Standard Minimum Rules for the Treatment of Prisoners, the UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment and other international human rights law and standards. If solitary confinement is used, it should not be as a punitive measure and only for the shortest time possible, it should be applied only in accordance with stringent due process requirements and regular, daily, access to adequate medical attention by a doctor must be granted. Solitary confinement may amount to a violation of the prohibition on torture and other ill-treatment.

According to Obaidullah's lawyers at the end of April, "after the April 13 raid in which prison guards put everyone hunger striking into solitary cells, he has had no toothbrush or toothpaste for two weeks, no nail clipper, no soap. His showers and recreation are often offered in the middle of the night, forcing him to choose between that and

sleep. The guards are making lots of noise to prevent the detainees from sleeping soundly." If these allegations are true, it appears that he is being punished for his protest. Deprivation of personal and dental hygiene materials, of personal effects and measures to deprive prisoners of sleep would breach international prison standards and could constitute ill-treatment.

The policy document contains some provisions, such as on providing accurate information to detainees on hunger strike, monitoring, evaluation, urgent medical aid (subject to consent), and voluntary resuscitation, that are consistent with the two international standards on medical ethics related to hunger strikes, cited above. However, at its core the Guantánamo hunger strike policy diverges dramatically from the existing ethical guidance in that it reveals no concern for the wishes of the detainees. At no point in this document are the wishes of the detainees taken into account. On the contrary, it is made clear that the detainees have no rights to make decisions or express wishes unless these coincide with the operational goals of the facility.

Again, given the past 11 years of these detentions, this is unsurprising. These are detainees whose rights have been systematically denied. In the fact that they fall short on international standards on medical ethics, the Guantánamo hunger strike policy guidelines are entirely consistent with the wider US policy on the detentions themselves.

It is time for the USA to stand up for human rights as it repeatedly promises it will. The administration and Congress have it within their power to remedy the situation at Guantánamo, not by breaking the hunger strike through force feeding, punitive action, or isolating the detainees, but by immediately moving to introduce real justice and respect for human rights as the route to resolving the detentions and finally doing what should have been done years ago – ensuring the release of detainees whom the USA does not intend to prosecute and the fair trial in independent civilian courts without recourse to the death penalty of those it does; and closing the detention facility for good.

With this in mind, Amnesty International urges the US government to take the following steps towards ending the injustice of Guantánamo:

- **Ensure all Guantánamo policies comply with human rights and medical ethics:** Pending resolution of the detentions, and without delaying that goal in any way, there should be an immediate detailed review of conditions of detention and of policies implemented in response to the hunger strike, including assessing cell-search, force-feeding and comfort item policies, facilitating continuing access for legal representatives to detainees, allowing full access to independent medical professionals, UN experts, and human rights organizations, and ensuring all policies comply with international human rights law and standards and medical ethics.
- **Dedicate resources, ensure human rights leadership:** A high-level White House position should be appointed to drive forward closure of the Guantánamo detention facility, to coordinate review of all executive options, and to liaise with and ensure pressure on Congress. This person should be fully aware of the USA's international human rights obligations and committed to ensuring respect for these obligations. There should be no more delays, and no more excuses for the USA's failure to meet its international human rights obligations.
- **Expedite safe detainee transfers:** Dozens of the Guantánamo detainees have long been "approved for transfer" by the US authorities. Many are Yemeni nationals, who remain in limbo because of the moratorium on repatriation of Yemeni detainees imposed by the administration over three years ago. The administration should accept Senator Dianne Feinstein's offer to help resolve the cases of the 86 detainees she has said were approved for transfer in the past and her call on the administration to review the repatriation moratorium.
- **Drop the "law of war" framework**: Even if the US administration meets its commitment to close the Guantánamo detention facility, it apparently intends to hold at least 46 of the detainees indefinitely without charge or trial somewhere else on the basis of its flawed "global war" framework. This is unacceptable, as is the continuing resort to military commission trials that do not meet international standards. Congress and the administration should commit to addressing the detentions under a framework that complies with international human rights law and standards, something that has been missing from the outset.
- **Charge and try in civilian courts:** Detainees who are to be prosecuted should be charged and tried without further delay in ordinary federal civilian court, without recourse to the death penalty. Any detainees who are not to be charged and tried should be immediately released.

Any resolution of the injustice of Guantánamo will be incomplete without full accountability for the human rights violations that have been committed against detainees, including the crimes under international law of torture and enforced disappearance. Genuine access to meaningful remedy must be guaranteed to those who have been subjected to violations, and the use of secrecy and immunity to block accountability and remedy must be ended.